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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

LEE WALKER,

Appellant,

against

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a municipal corporation; T. E. CHENOWETH, City Manager of said City; ROBERT G. KING, Mayor and Member of the City Commission of said City; CHARLES N. BROWN, JERRY STREMEL, R. C. WOODARD and C. E. JOHNSON, Members of the City Commission of said City.

JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the District Court of Reno County, Kansas, has not been reported. The decision of the Supreme Court of the State of Kansas is reported at 178 Kan. 263, 284 P. 2d 1073. Copies of those opinions are annexed hereto as appendices A and B respectively, at pp. 12 and 24 respectively.

Grounds on Which Jurisdiction Is Invoked

1. *The nature of the proceeding.* Appellant, a property owner, brought an action to permanently enjoin the de-

fendant City of Hutchinson, Kansas, from entering or trespassing upon plaintiff's real estate, which had previously been condemned by the City of Hutchinson under its powers of eminent domain. Only a single unseen notice of publication had been given. Appellant had neither actual notice nor opportunity for a hearing. This is an appeal from the decision of the Supreme Court of the State of Kansas affirming the dismissal of the petition.

2. *The judgment or decree sought to be reviewed* was dated and entered on June 11, 1955, and is embodied in the opinion of the Supreme Court of the State of Kansas (*post*, at p. 32). No separate order, judgment or decree was entered, the opinion itself containing the order. An order denying rehearing was dated and entered July 6, 1955. The notice of appeal to this Court was filed in the Supreme Court of the State of Kansas on September 6, 1955.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is 28 U. S. C. Sec. 1257(2).

4. *Cases believed to sustain the jurisdiction: Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306; *Georgia* v. *Chattanooga*, 264 U. S. 472; *North Larramie Land Co.* v. *Hoffman*, 268 U. S. 276.

5. *State statute whose validity is involved.*

G. S. 1949, 26-202. "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

Questions Presented

1. Whether G. S. 1949, 26-202 of the statutes of Kansas, which permits a city to give notice of the commencement of condemnation proceedings against real property by publication one time in the official city paper, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the aforesaid statute, when construed and applied to permit condemnations of property without any other notice in a case in which the owner had no actual notice or any reason to know of the contemplated condemnation proceedings, and the aforesaid owner is eighty years of age and has only an education equivalent to the sixth grade, is repugnant to the due process clause of the Fourteenth Amendment.

Statement of the Case

Appellant filed an amended petition for a permanent injunction against the City of Hutchinson and its various officers in the District Court of Reno County, Kansas. The amended petition (A.A. 2-6)[1] alleged that the plaintiff, an 80-year old Negro with a sixth grade education, had owned certain real estate for 49 years. It was further alleged that the City of Hutchinson had filed an action for condemnation of said property in the same court against the same property, of which action plaintiff never received any notice through summons or otherwise. The action of the City, the complaint alleged, rested upon its purported power to institute such proceedings by one publication in the official City paper, which said publication had been had, but plaintiff had never learned of these proceedings

[1] Such references are to the page numbers of "Abstract of Appellant".

until several months after the court action had been concluded. The complaint further alleged that the "single notice so published in the official newspaper was insufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State constitutions." (A.A. 4). The answer admitted that only one such publication had been timely made (A.A. 6). The answer claimed that the said notice by publication was sufficient under the due process clause of both the United States and Kansas constitutions (A.A. 7). It showed that the said notice of condemnation had been addressed to approximately 33 persons, and that plaintiff's name was 25th on the list.[2] Plaintiff's reply denied the legal conclusion that the statute did not violate the Fourteenth Amendment due process clause (A.A. 13).

The District Court, in its memorandum opinion, ruled solely on the question of constitutionality, holding that the statute did not violate the due process clause of the Fourteenth Amendment. Said the Court:

> "In view of what has been said above, and the authorities there cited, it must be held that the section under consideration is constitutional and that, since it is conceded that the City acted pursuant to such statute and complied with its requirements, plaintiff has not been deprived of his property without due process of law." (A.A. 23).

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[2] The addressing part of the notice of condemnation read as follows: "To: PATRICK J. O'FARRELL, AGATHA O'FARRELL, JENNIE MUELLER, KENNETH D. GITCHELL, MYRTLE GITCHELL, J. O. GITCHELL, NELLIE B. GITCHELL, EVERETT S. COLE, NINA M. COLE, NELLIE GITCHELL, PEARL D. GRAHAM, THE RAILROAD BUILDING, LAND AND SAVINGS ASSOCIATION, H. K. GORDON, VIRGINIA DEAN GORDON, V. W. COCHRAN, ANITA COCHRAN, ROY FREEMAN, J. W. WOOD, OPAL O. WOOD, FRED W. GILBERT, FERN GILBERT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF HUTCHINSON, OBLATE AND COMPANY, LEE WALKER, GLADYS G. WHITFORD, CLAUDE M. REED, ANNA EDNA REED, M. M. HAYS, RUTH J. HAYS, HERBERT K. HARRISON, THERESA R. HARRISON, W. C. WILDE, AND ALL OTHER PERSONS CONCERNED." (A.A. 8).

The notice of appeal to the Supreme Court of Kansas specified as the sole ground for appeal that plaintiff had been deprived of his property without due process of law (A.A. 26-27). The Supreme Court of the State of Kansas affirmed the decision below, after discussing federal and state precedents, holding that the statute did not violate the due process clause of the Fourteenth Amendment of the U. S. Constitution. Said the Court:

> "No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that *the trial court did not err in holding that G.S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant*, and accordingly the judgment of the trial court is affirmed." App. B at 32, *post*; 178 Kan. at 269, 284 P. 2d at 1077. (Emphasis supplied.)

Substantiality of Federal Questions

The questions raised in this case are perhaps among the most vital due-process questions affecting property rights since the steel seizure case. For if the procedure condoned below is not ruled unconstitutional, it means that any real property owner in the United States—be he illiterate or educated, a newspaper reader or non-newspaper reader, his address known or unknown—may be deprived of his property in eminent domain proceedings and compensation determined without notice and the right to be heard merely upon one publication in an official city newspaper, whether or not he has ever seen that newspaper or had an opportunity to do so. The substantiality of the questions raised herein is reinforced by the fact that eight persons have filed this Term a Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Tenth Circuit in a case involving this very same issue. *Collins*

et al. v. *The City of Wichita, Kansas*, No. 392, U. S. Sup. Ct., Oct. Term, 1955.

We contend that the statute, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment to the U. S. Constitution. This follows from this Court's opinion in *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, for this Court there held that the distinction between actions *in rem* and actions *in personam*—the basis on which the courts below proceeded—was an artificial distinction which did not solve the problem of what was adequate notice under the due process clause of the Fourteenth Amendment. Said this Court:

> "* * * But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." 339 U. S. at 312-313.

The question in every case is whether the notice given was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

* * *" This must be done "with due regard for the practicalities and peculiarities of the case * * *." *Id.* at 314-15. This opinion was ignored by the courts below.

We submit that the notice in the case at bar was given without any regard for the practicalities or peculiarities of either the individual case or the kind of cases which arise. There is no excuse in reason or logic to deprive a citizen resident of a state of some form of actual notice; we have so far been unable to discover any other statute of another state permitting only notice by one publication. While it may be argued that each citizen is charged with the knowledge of the law, and that therefore each and every property owner is charged with a duty of reading the official city newspaper each and every day 365 days a year to see if any proceedings have been begun, it must be pointed out that in the *Mullane* case the notice given to the individuals effected by publication in a local newspaper was given only after the individuals concerned had been given actual notice of the statute, and that this Court nonetheless ruled that such publication was not due notice. The publication there was a publication for at least four times. Publication here was given only once. The residence of plaintiff in this case was always known to the defendants; he had always paid his assessments and taxes (A.A. 3). Respondents have nowhere contended that notice given by mail would have been impracticable. Said this Court in *Mullane:*

> "As to known present beneficiaries of known places of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.

* * * * * *

"The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

"In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U. S. 90, 91, 61 L. ed. 609, 37 S. Ct. 343, LRA 1917 F 458." *Id.* at 319-20.

Any other rule would surely be violative of due process. For one thing, it is too much to expect that every person who owns property for 50 years will examine the legal notices in the official city paper 18,250 times, poring through all the names that are mentioned. Old men with little schooling, like plaintiff, cannot be expected to receive actual notice through this device. The forlorn hope that some-

friend of the person affected might be such an avid reader of legal notices that he would note this and tell the property owner about it is even more forlorn when only one publication is made. There is no assurance even that a property owner will be able to receive each daily newspaper; the issue of the day might be sold out, and it is too much to expect the property owner to journey to a library to examine each issue, if indeed the library happens to contain the paper.

The opportunities for abuse by the procedures sanctioned below are great. In the *Collins* case, *supra,* for example, a proceeding was begun in which the landowners appeared, but a new notice of condemnation was printed in the daily paper, which did not come to anyone's attention, and the property stood condemned nonetheless through this second proceeding (Petition, pp. 6-8).

The Court below cited only two U. S. Supreme Court cases. Both are inapposite. It cited *Georgia* v. *Chattanooga,* 264 U. S. 472, for the proposition that "the taking was a legislative and not a judicial function and an opportunity to be heard in advance need not be given * * * " (178 Kan. at 268, 284 P. 2d at 1076), but ignored this Court's subsequent language in a later case that "With respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings." *North Larramie Land Co.* v. *Hoffman,* 268 U. S. 276, 284-285. The *Georgia* case also involved a nonresident who could not be personally served. And in citing the *North Larramie* case in support of its position, the court below ignored the fact that the statute there in question required *nine* publications, and that the landowner had a right to go into court after appraisal with a right to trial *de novo.* In any event, to the extent that these two cases

are inconsistent with *Mullane*, they either have been or should be overruled.[3]

The only excuse for procedure of notice by publication, as this Court held in *Mullane*, is that the person cannot be personally reached because his address is not known. This has been the traditional justification behind the whole doctrine of service by publication; it is surely lacking here. The statute applies both to persons whose addresses are known and those unknown. The state has failed to provide any other remedy through which a person who does not receive actual notice could reopen the case. These circumstances so shock the conscience as to amount to a severe violation of due process of law.

We do not believe that this Court can sanction the procedure under which a person who had enjoyed quiet possession of property for 49 years could be deprived overnight of his property without any actual notice, when his address was on the records of the city, through one publication in a newspaper of his name lumped with many others. If this procedure be countenanced, then divorce actions could be started solely by one publication in a newspaper; legal actions could be begun in the same fashion; and our busy citizenry would be reduced to the status of poring through small type legal notices in our newspapers without any assurance at all that they will receive notice of actions that may be begun against them or their belongings.

We annex herewith, as Appendix C, an affidavit of A. Lewis Oswald which indicates that large numbers of persons' rights would be affected by a decision in this case.

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[3] Perhaps the true rule is this: that whatever may be the rule as to notice re a sovereign's plenary power over land, and whatever may be the rule in the clearly *in rem* proceeding to transfer title, the question of the *amount* of the award—clearly involving only a sum of money—cannot be determined by proceedings without the same notice that would be constitutionally required in an ordinary action at law. The statute in question here deals solely with appraisal.

We believe that the discussion above, together with this affidavit, demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Consider, too, that the decisions of the highest state courts are in conflict on substantial aspects of the questions presented (see District Court opinion, p. 18, *post*).

Respectfully submitted,

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APPENDIX A

Memorandum Opinion of the District Court of Reno County, Kansas

Plaintiff's application for a temporary injunction was heard on October 4th. At the conclusion of the hearing, counsel requested that, to eliminate the need of further trial, the case be placed at issue immediately and that decision then be rendered on plaintiff's prayer for a permanent injunction, based on the pleadings, and considering the proceedings of October 4th as having been had on a hearing for permanent injunction. By agreement of counsel, defendants' motion to strike was thereupon sustained, after which plaintiff filed his amended petition. The defendants have filed their answer, and the plaintiff, his reply. The case is now at issue and decision will be as to the issuance of a permanent injunction.

At the outset it must be borne in mind that the inquiry in this matter must be directed to the constitutionality of Section 26-202 as it pertains to the facts of this case and whether plaintiff has been deprived of his property without due process of law by reason of the notice given thereunder, rather than to the wisdom of the legislature in passing the statute or the expediency of action by the City pursuant thereto. Whether the statute was wisely enacted and whether sound public policy should dictate the giving of different or additional notice are matters that must be addressed to the legislative rather than to the judicial branch of government, always provided of course that the statute does not contravene constitutional provisions.

The statute involved in this action provides, so far as herein pertinent, that the condemnation commissioners shall give owners and lien holders of the property condemned

at least 10 days notice in writing of the time and place when and where the damage will be assessed, *or* by one publication in the official city paper. This statute first appeared as Section 2, of Chapter 86, Laws of 1913, in which it was provided that the commissioners give at least 10 days' notice in writing by one publication in the official city paper. The 1913 law was revised in 1923 and appeared in its present form in the Revised Statutes of 1923. It has undergone no material change since then.

It is plaintiff's contention that the notice provided for by said statute is unconstitutional, particularly as it pertains to resident land owners, because it provides for notice by publication rather than by personal service. However, the general rule appears to be that personal service of a notice of this knid is not required by those constitutional provisions that prohibit the taking of property without due process of law. In Section 1534, McQuillan on Municipal Corporations, the rule is thus stated:

> "It is almost universally held, however, that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending."

The same rule is set out in 20 CJ 938, wherein it is said:

> "Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, and it is competent for the legislature to provide for constructive notice by publication."

In the case of State of Georgia v. City of Chattanooga, 264 U. S. 472; 44 Sup. Ct. 369; 68 Law Ed. 796, the United States Supreme Court, speaking on page 800, says:

> "Personal service upon the owner is not essential; publication of notice is sufficient."

This rule was approved and followed in the cases of Newman, et al. v. Lynchburg Investment Corporation, 236

U. S. 692; 35 Sup. Ct. 477, 59 Law Ed. 792, and Ballard v. Hunter, 204 U. S. 254; 51 Law Ed. 461. And in the case of North Laramie Land Company v. Hoffman, 268 U. S. 283; 69 Law Ed. 953, the court says:

> "All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application,—facts of which the landowner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

One of the latest expressions of the United States Supreme Court is found in the case of Anderson National Bank v. Luckett, 321 U. S. 233; 64 Law Ed. 599, in which the court upheld notice given to bank depositors by posting a report on the courthouse door or bulletin board as being sufficient to satisfy the requirements of due process of law. In discussing the question, the court says, on page 605:

"All persons having property located within the state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and other procedure which they set up for those purposes (citing authorities). Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners are familiar examples."

Cases from several states are found in support of this rule of law, and reference is here made to a few of them. In the case of Henritzy v. Harrison County (Miss.), 178 So. 322, the county had condemned land without any notice and thereafter published notice advising land owners to file their claims for compensation within 30 days. This procedure was held valid, and the court, in its discussion, said:

"In the case of Stewart v. Hinds County, 25 Miss. 479, the point was made by the owner of the land that he could not be bound by the condemnation proceedings without being first personally served with notice, he being a resident of the state. But the court held that notice in such case may be either actual or constructive, and particularly so in a case like this (condemnation for highways) which is a proceeding in rem and not in personam."

"We believe the present case is strictly a proceeding in rem, in which the order of the court is conclusive, whether the party had notice of the proceeding or not."

The case of Nishnabotna v. Drainage District (Mo.), 55 SW 276, was one in which the court upheld a statute that authorized the institution of condemnation proceedings by the publication of notice against owners regardless of their residence. On page 277, the court says:

"That the legislature had the right to prescribe the manner of giving notice in such cases there can be no question, provided always that it be reasonable."

The statute involved in the case required a 15 days' notice and notice was actually given for 19 days, in three publications. In the case of Ryan v. Housing Authority of the City of Newark, 15 Atl. 2647, the Supreme Court of the State of New Jersey held that notice of the proceedings may be indirect. See also, Great Northern R. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Taylor v. Emmet Co. Drainage Dist., 167 Iowa 42, 148 N. W. 1040; Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353.

The case of Winnebago Furniture Manufacturing Company v. Wisconsin Railway Company, 51 N. W. 576, appears to be quite in point. In that case the Wisconsin statute provided for alternative methods of giving notice, either by publication or by personal service, and the court, in upholding the statute, says:

> "The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested not less than five days before such hearing, or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the date set for hearing such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified and by publication on resident as well as non-resident owners in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. Mr. Lewis, in his work on Eminent Domain, Section 367, says, 'In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending'."

It is to be noted that the statute involved in this case is very similar to the one under consideration since the alternative methods of giving notice are the same and the length of time required is identical.

Admittedly, there are authorities which hold to the contrary. The Supreme Court of Michigan in the case of Knudinger v. City of Saginaw, 26 N. W. 364, declared invalid a city ordinance which made no provision for personal service of a notice upon resident owners in cases where such service was feasible. Likewise, the Supreme Court of the State of Washington, in the case of Smith, et al. v. Cochrane, (Wash.), 37 P. 311, held that personal notice was necessary in case of resident landowners and that the requirements of due process were not fulfilled when publication service only was had upon them. However, in this latter case the court recognizes that its holding is against the weight of authority and says, on page 312:

> "Returning to the question of notice, there is no doubt that the prevailing number of cases, and perhaps the weight of authority, the country over, is that in condemnation cases the legislature has the power to prescribe the kind of notice, whether personal or constructive, which shall be given to property owners, resident or nonresident. Lewis, Em. Dom. Sec. 367; Brown, Jr., Sec. 172; Elliott, Roads & S., pp. 152, 153."

Two Wisconsin cases are also cited in support of the doctrine enunciated in the last two cases but both cases were decided prior to the case of Winnebago Furniture Company v. Wisconsin Railway Company, supra, and both were overruled by the later case.

Although the Supreme Court of Kansas has never passed upon the constitutionality of Section 26-202, or the validity of the provision for notice, nevertheless it has had occasion to discuss and pass upon similar questions relating to notice

in connection with other condemnation statutes. The early case of Hunt v. Smith, 9 Kan. 137, was an action to enjoin certain individuals from appropriating land for a railroad right of way and to recover damages for trespass upon such land. The defense interposed was that the land had been condemned, but plaintiff contended that the condemnation proceedings were invalid because of defective notice. Section 49 of the pertinent law then in effect required that personal notice be served upon actual occupants of the land, while Section 86 provided for notice by newspaper publication generally. The plaintiff alleged he was a resident of the state, was in actual possession of the land, looking after and caring for the same, but did not actually reside thereon, although having keys to the house and stables. The court held that plaintiff was not an actual occupant of the land, although he was the owner, and that the service upon him by publication was valid. The court says on page 145:

> "An owner of land is not in the actual occupancy of the same within the meaning of Section 49 of the act concerning private corporations, unless he is an actual resident thereon: and where such owner is not an actual occupant of the land, notice of the appropriation of a part of the same for a right of way for a railroad given by publication in a newspaper as provided by Amended Section 86 of such act, is sufficient."

The case of Missouri River F. S. & G. R. Company v. Shepard, 9 Kan. 647, was brought against the railroad company to recover damages for trespass and involves the same Section 86 referred to in the Hunt case. The railroad company had condemned certain land but the plaintiff, who was the owner and in possession of the land concerned, claimed that the proceedings were invalid for the reason that no map and profile had been filed before notice was given and that therefore there was no

actual notice. The court first discussed the question of filing the map and profile and concluded that it need not be done before publishing notice. Then, turning to the question of notice, the court says on page 654:

> "Is the law unconstitutional because providing for no notice? If the law was silent as to notice, and an attempt was made by it to divest one of his property without any pretense of notice, its unconstitutionality would be undisputed. A man cannot be deprived of his property without due process of law. This process of law implies notice; not necessarily actual, personal notice, but notice; such that there is a reasonable probability of the party's receiving it." . . . "Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard and defend, and right of appeal from the decision of the commissioners to the district court. The real objection, therefore, is that the notice provided for is insufficient. Section 86 of this article reads, that 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county', etc. This does not contemplate personal notice. Nor is this essential. As we understand the learned counsel for defendant in error, they concede this. The statutes are full of instances of constructive notice, as in cases of publication against non-residents, in attachment suits, foreclosures of mortgages, etc.; or in cases of changes in the valuation of real estate by the boards of equalization; or in the matter of street improvements in cities, or opening roads in the country."

This language is peculiarly appropriate to the case at bar and has never been criticized by the Supreme Court in any subsequent decision. It appears just as valid today as it was when uttered many years ago.

The provisions concerning notice by publication contained in this same Section 86 were upheld by the Supreme Court of the United States in the case of Huling v. Kaw Valley Railway and Improvement Company, 130 U. S. 559, 32 Law Ed. 1045. Although in this case the land owner was a non-resident of the state, and the precisee question involved was the validity of the service as it pertained to such an owner, no distinction seems to have been made, in much of the language used, between residents and non-residents. On page 563, the court, in discussing the propriety of publication notice, states:

> "Nor have we any doubt that this form of warning owners of property to appear and defend their interest, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action by the tribunals appointed by proper authority to determine those matters."

A more recent Kansas case, which is illuminating, is that of Harrison v. Newman, et al., 71 Kan. 324, which upheld a notice by publication given in condemnation proceedings. The statute provided for the appointment of appraisers who should have at least three days' notice in the official paper of the time and place of their meeting for the assessment of damages and benefits. The court held that condemnation proceedings conducted under this statute and in pursuance of such notice was valid. In the syllabus the law of the case is set out as follows:

> "The notice required by section 160 of the act relating to cities of the first class (Laws 1903, ch. 122) to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley is a

substitute for the notice required by section 161a of the same act to be given by the appraisers appointed to assess damages in condemnation proceedings generally."

"A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set."

In view of the Kansas cases cited above, none of which have been disapproved or overruled in any way, it appears to me that the question as to the validity of notice by publication cannot at this time be considered an open one in Kansas. The pronouncements of the Supreme Court concerning the notice required in condemnation matters appears definitely to be in accord with the generally accepted rule prevailing in this country.

But it is also contended the statute is invalid for the further reason that the length of notice required is but 10 days and that but one publication thereof is required. Parenthetically it may here be noted that the notice was actually published 13 days prior to the meeting of the condemnation commissioners. Perusal of cases involving the question of notice discloses a variety of statutory provisions as to requirements for length of time and number of publications, ranging from the three days and one publication involved in Harrison v. Newman, supra, to the thirty days' notice required by the statute construed in Hunt v. Smith, supra, and Missouri River F. S. & G. R. Company v. Shepard, supra. In the Wisconsin case before cited the length of time was 10 days and the number of publications one. Statutes construed in other cases cited herein provide for notices of 10, 15, 20 and 30 days, with the number of publications varying in each instance with the length of the notice. From a consideration of all the cases examined I cannot conclude that the provi-

sions for notice contained in Section 26-202 are so unreasonable as to violate the due process clause of the constitution.

In view of what has been said above, and the authorities there cited, it must be held that the section under consideration is constitutional and that, since it is conceded that the City acted pursuant to such statute and complied with its requirements, plaintiff has not been deprived of his property without due process of law.

In arriving at this conclusion the Court does not intend to express an opinion as to the wisdom of the statutory requirement, nor to indicate any personal approval of the form or type of notice given in these condemnation proceedings. Such matters are not within the judicial prerogative.

In accordance with the views expressed herein the plaintiff's prayer for a permanent injunction will be denied as of the 1st day of November, 1954.

JOHN FONTRON,
District Judge.

APPENDIX B

Opinion of the Supreme Court of the State of Kansas

No. 39,782

SYLLABUS BY THE COURT

In an action to enjoin a city from entering upon real estate taken by it under a proceeding in eminent domain, the record is examined, and it is *held,* that G. S. 1949, 26-202, which provides that the commissioners appointed by the judge of the district court shall give any owner of the property sought to be taken ten days' notice by publication in the official city paper that at the time fixed by such notice the commissioners will appraise the value of the lands taken and assess the other damages done to the owners of such property, does not deprive such owner of due process of law and is not unconstitutional.

Appeal from Reno district court; JOHN FONTRON, judge. Opinion filed June 11, 1955. Affirmed.

The opinion of the court was delivered by

THIELE, J.: This was an action in which the plaintiff Lee Walker sought an injunction against the defendant city to prevent an alleged trespass on his real estate. The relief sought was denied by the trial court and plaintiff has appealed.

Insofar as need be noticed plaintiff alleged that he owned certain described real estate in the city of Hutchinson and that on April 12, 1954, the city, by its officials, commenced proceedings in the district court to condemn property for the acquisition of right-of-way for opening, widening and extending portions of named streets in the city; that plaintiff had never been notified in any manner that the city desired his real estate nor had he ever been served with

summons nor given any personal notice that the city had filed the proceeding for the purpose of taking a part of his real estate; that the pretended right of the city to take the real estate owned by the plaintiff rested upon the authority of G. S. 1949, 26-201 and 26-202, which statutes are void and of no force because they attempt to vest the power in the city to take property without due process of law; that the only notice to an owner of real estate, under those statutes, is by publication and is not sufficient under the due process clauses of the United States constitution and the state constitution; that plaintiff had no actual notice or any reason to know the city sought to condemn and take his real estate until the middle of August, 1954, unless it can be said the single legal publication, published once in a named newspaper gave him notice, and that such single published notice was not sufficient to satisfy the requirements of the due process clauses of the above constitutions. It was further alleged that the city was entering upon plaintiff's real estate for the purpose of building a highway across it, all in disregard of plaintiff's rights and that he was entitled to an order enjoining the city from so doing, and he prayed accordingly.

The gist of the defendant's answer was that the city was proceeding under the above statutes, and that it instituted proceedings in eminent domain and that the commissioners appointed by the judge of the district court gave notice by publication in the manner prescribed by G. S. 1949, 26-202 which notice specifically named the plaintiff, described the portion of his real estate being condemned for a public street and which notice was published more than ten days prior to April 27, 1954, the date set forth in the notice for the meeting of the commissioners for assessment of damages and appraisal of the lands taken; that the notice by publication and the procedure followed was authorized by the above statutes and was legal and valid. Attached to the answer was a copy of the notice published in the Hutchinson News-Herald, the official city

paper, on April 14, 1954, which shows that notice of condemnation was given to Lee Walker and others that an application had been made requesting the district judge of Reno county to appoint commissioners to make an appraisement of lands taken under and by virtue of G. S. 1949, Ch. 26, Art. 2, and describing fourteen tracts of land in the city and that the judge had appointed three commissioners who would meet at a specified place on April 27, 1954, then and there to commence and proceed with the duties imposed upon them by law.

The plaintiff's reply admitted the material facts pleaded and denied the legal conclusion that the mentioned statutes did not violate constitutional provisions as to due process.

Details of the trial need not be noted. The trial court prepared a memorandum decision which covered rather fully the questions of constitutionality. The journal entry of judgment discloses the trial court heard the evidence, examined the pleadings and briefs filed and on November 1, 1954, found that G. S. 1949, 26-202 was constitutional; that the city of Hutchinson acted pursuant to it; that plaintiff had not been deprived of his property without due process of law and it denied plaintiff the relief for which he prayed and rendered judgment for the defendants.

The plaintiff perfected his appeal specifying as error that the trial court erred in holding G. S. 1949, 26-202 constitutional and in denying the injunction sought.

The question of constitutionality turns on the first sentence of the last mentioned statute, which reads:

> "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the

value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

For purposes of information we note the above statute was amended by the legislature in 1955 by the enactment of Senate Bill No. 313.

In his brief the appellant first directs attention to and quotes from 12 Am. Jur. 267, where it is stated that the elements of due process of law are notice, and an opportunity to be heard and to defend; that it is a rule as old as the law that no one shall be personally bound until he has been duly cited to appear and has been afforded an opportunity to be heard, and that a judgment without such citation and opportunity lacks all the attributes of a judicial determination and is never to be upheld. Appellant then directs attention to the statute as quoted above and to the fact that it provides two methods for giving notice, one by a least ten days' notice in writing, the other by one publication in the official city paper, and he contends that the first method is fair and the second method unfair. It is here pointed out that he does not contend that if the second method was proper, what was done by the city did not fully meet the statutory requirement. In expanding his argument appellant stresses his age; his education and the length of time he had owned his real estate; that the three branches of the government, executive, legislative and judicial, have a duty to uphold the constitution and that it may not be amiss to consider how such an unconstitutional act was ever made part of the statutes; that in fairness the city should have given him personal notice and should not have followed the provision for publication notice; that the statute provided a right way and a wrong way and the "wrong way" violated his constitutional rights to due process. There is no specific argument that a statute providing for notice by publication in a proceeding to condemn lands in the exercise of the right of eminent domain is un-

constitutional as depriving the owner of due process of law, and except for the reference to 12 Am. Jur. 267, there is no citation of any authority in support of the argument made. In such a case we might follow the rule that where, in connection with a contention of error by the trial court, no citation is made of authorities in support, this court may well conclude that counsel, after diligent search, has not been able to find any, and affirm the judgment: (*McCoy v. Fleming,* 153 Kan. 780, 113 W. 2d 1074.)

In our opinion, however, the trial court did not err. In view of the question presented we need pay no attention to the provision for personal service, for none was had. The question is whether a statute which provides for publication service of notice, as was had, deprives the owner of real estate of his property without due process of law.

Our approach to the problem of constitutionality, or lack of it, is governed by the oft recognized rule that all presumptions are that the statute is constitutionally valid and before the court can declare it invalid it must clearly appear to be unconstitutional. (See *Hartman* v. *State Commission of Revenue and Taxation,* 164 Kan. 67, 70, 187 P. 2d 939; *Miller* v. *Jackson,* 166 Kan. 141, 143, 199 P. 2d 513; *Board of Education of School Dist. No. 1* v. *Robb,* 168 Kan. 368, 369, 212 P. 2d 306, and cases cited therein.) We also bear in mind that the general rule is that proceedings to exercise the right of eminent domain are in rem and not in personam (29 C. J. S. 1129, 18 Am. Jur. 738, McQuillin on Municipal Corporations, Vol. II, pg. 531, and *Todd* v. *Atchison, T. & S. F. Rly. Co.,* 134 Kan. 459, 7 P. 2d 79, and cases cited).

Although stated in varying language, in many of the texts and encyclopedias treating of notice in condemnation proceedings the rule almost universally followed is that where the statute does not preclude its application, notice by publication is sufficient and satisfies the constitutional requirement, even with respect to persons residing within

the jurisdiction where the proceedings are pending. See Lewis on Eminent Domain, Third Edition, pg. 1010, § 568; Randolph on Eminent Domain, pg. 306, § 337; Nichols on Eminent Domain, Vol. 4, pg. 339; McQuillin on Municipal Corporations, Vol. 11, pg. 549; 18 Am. Jur. pg. 967; and 29 C. J. S. pg. 1217.

In Merrill on Notice, Vol. 1, pg. 510, § 518 (published in 1952) it is said:

> "Assuming notification to be necessary, there is much liberality in the decisions as to the methods which, consistently with due process, may be employed. Save in isolated instances which hardly serve to mark exceptions to the general rule, personal notification is not regarded as an essential element of the 'law of the land,' unless a personal liability is to be enforced against one not otherwise subject to the 'jurisdiction'. The hallowing effect of time seems the chief factor in judicial willingness to accede to the employment of methods which can be regarded as likely actually to result in knowledge only upon the assumption that the notices, exercising the highest degree of care to determine whether any monition has been given, will carry his search into the highways and byways. Another factor, no doubt, is the expedition of public business resultant upon sustaining such arrangements.
>
> "Thus it comes about that public posting, eminently inefficient as a source of information under modern conditions, is accepted as consistent with due process of law in drainage, paving, and irrigation proceedings. Publication, a whit more dependable, but still a very precarious way of spreading the news, has received judicial approval in numerous instances, including: special assessment proceedings; proceedings to organize irrigation or drainage districts; the assessment, equalization, and enforcement of taxes; eminent domain proceedings; land registration proceedings; and

the process of administrative tribunals. The place of printing the newspaper in which a notice affecting realty is published has been held immaterial, the important thing being publication within the locality wherein the land affected lies. Publication within the limits of the principal city in a water district has been adjudged due process as to owners of land outside the city limits but within the boundaries of the district.

"Naturally combinations such as posting and publishing, or mailing and publishing, or a choice between either of two constitutionally permissible notifications, as posting or publishing, will pass muster."

In *Winnebago Furniture Mfg. Co.* v. *The Wisconsin Midland R. Co.*, 81 Wis. 389, 51 N. W. 576, the court considered the sufficiency of a notice arising under a statute similar to ours and held, in part, that:

". . . The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing, or by publication in some newspaper to be designated by said court or judge, not less than ten days before the date fixed for the hearing of such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as nonresident owners, in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. . . ." (l. c. 394)

Georgia v. *Chattanooga*, 264 U. S. 472, 44 S. Ct. 369, 68 L. Ed. 796, involved condemnation of lands for railroad purposes. The facts need not be detailed. In the course of the opinion it was said the taking was a legislative and

not a judicial function and an opportunity to be heard in advance need not be given, and further, that personal service on the owner was not essential: that publication of notice was sufficient.

In *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; 45 S. Ct. 491, 69 L. Ed. 953, the court considered an appeal from the judgment of the Supreme Court of Wyoming upholding a condemnation for road purposes. In disposing of the contention that the statute and proceedings under it amounted to a denial of due process of law, the court said:

> "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559; *Ballard* v. *Hunter*, 204 U. S. 241, at p. 262." (l. c. 283)

With respect to notice by publication, after stating the facts and the requirements of the statute, the court said further:

> "* * * These requirements in all material respects are identical with those passed upon by this Court in *Huling* v. *Kaw Valley Railway & Improvement Co.*, *supra*, in which it was held that a statute of Kansas providing that the condemnation of land for use for railroad purposes might be effected on thirty days' notice by publication in a newspaper, satisfied all the requirements of due process of law." (l. c. 285)

Appellees direct our attention to *Harrison* v. *Newman*, 71 Kan. 324, 80 Pac. 599. In that case the question was whether one statute requiring personal notice or another providing for notice by publication controlled. This court held the latter statute controlled and that notice thereunder was properly given. No question of constitutionality was involved and the case cannot be said to be decisive here.

No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that the trial court did not err in holding that G. S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant, and accordingly

The judgment of the trial court is affirmed.

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES.

LEE WALKER Appellant vs. CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation; HAL EVERETT, City Manager of said City; JOHN OLSON, Mayor and Member of the City Commission of said City; JOE BENNETT, E. J. WHALEN, JR., R. C. WOODARD and C. E. JOHNSON, Members of the City Commission of said City Appellees	No. .....

AFFIDAVIT [1]

Relative to the use of G.S. 26-202, Kansas, for purpose of service on defendants.

STATE OF KANSAS }
COUNTY OF RENO } ss.:

A. Lewis Oswald, of lawful age, being first duly sworn on his oath, says:

1. That he is a member of the Bar of the Supreme Court of the United States; that he is a resident of Reno County, Kansas; and that his post office address is c/o Oswald, Mitchell & Thiessen, Attorneys, 119 West Sherman Street, Hutchinson, Kansas.

[1] The original copy of this affidavit has been filed with the Clerk of this Court.

2. That he is counsel for the Appellant in the above captioned cause of action.[5]

3. That he has personally examined the court files in the following causes of action, which were filed in the District Court of Reno County, Kansas, on the dates below set forth; that in each case so set forth, the only service upon the defendants therein was pursuant to the General Statutes of Kansas (1949), Section 26-202, namely by a single publication in a newspaper which had been duly designated as the official publication for said City of Hutchinson, Kansas:

Case No.	*Date Filed*	*Title of Cause of Action*
6235	Sept. 11, 1951	In the Matter of the Application of the City of Hutchinson, Kansas, a Municipal Corporation, for the Appointment of Commissioners in the Matter of the Condemnation of Private Property for an Off-Street Parking Station in the City of Hutchinson, Kansas.

(This file shows, by affidavit of D. R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication of "Notice of Condemnation" is attached, that said publication was published only ONE time, namely on the 21st day of September, 1951.

Said "Notice of Condemnation" gives notice to Robert E. Mann, Arthur R. Mann, L. M. Mayfield, Charles Hatfield and James Henry, and all other persons concerned.)

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[5] The title of the case has been changed to the title that appears on the cover from the old title used by Mr. Oswald, pursuant to a substitution of parties respondent allowed by the Supreme Court of Kansas.

Case No.	*Date Filed*	*Title of Cause of Action*
6273	Oct. 4, 1951	In the Matter of the Application of the Board of the State Fair Managers of Kansas in the Name of the State of Kansas, for the Appointment of Commissioners to Condemn Land for Fairgrounds and Fair Purposes.

(This file shows, by affidavit of D. R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication of "Notice of Meeting of the Commissioners" is attached, that said publication was published only ONE time, namely on the 8th day of October, 1951.

The landowners in this cause of action were Houston L. Whiteside, individually, and Houston L. Whiteside, as Testamentary Trustee.)

Case No.	*Date Filed*	*Title of Cause of Action*
7291	May 16, 1953	In the Matter of the Application of the City of Hutchinson, Kansas, for the Appointment of Commissioners in the Condemnation of Property for the Purpose of Providing the Necessary Right of Way for the Hutchinson Flood Control System.

(This file shows, by affidavit of Drury R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication of "Notice of Condemnation" is attached, that said publication was published only ONE time, namely on the 18th day of May, 1953.

Said "Notice of Condemnation" gives notice to Hal C. Nelson and ——— Nelson, his wife, Anna Q. Nelson

and ——— Nelson, her husband, Minnie B. Obee and ——— Obee, her husband, Ella B. Shive, also known as Ella Shive and ——— Shive, her husband, B. T. Stofer and ——— Stofer, his wife, Opal L. Stofer and ——— Stofer, her husband, Robert L. Jenkins and ——— Jenkins, his wife, O. B. Hester and ——— Hester, his wife, Edith E. James and ——— James, her husband, George D. James and ——— James, his wife, Dorothy Pence and ——— Pence, her husband, Robert Mills and ——— Mills, his wife, Burley V. Bird, Jr. and ——— Bird, his wife, Ray E. Smith and ——— Smith, his wife, Ernest Murphy, Executor of the Estate of Angie E. Chrisman, Deceased, Addie Cole Roland and ——— Roland, her husband, Emy Cole Bailey and ——— Bailey, her husband, Ruth R. Gillispie and ——— Gillispie, her husband, L. Roy Cole and ——— Cole, his wife, Roberta Cole Sewell and ——— Sewell, her husband, Peggy Cole Meyer and ——— Meyer, her husband, Cleo Cole Congdon and ——— Congdon, her husband, Mabel I. Chrisman and ——— Chrisman, her husband, The Unknown Heirs, Devisees, Trustees, Creditors and Assigns, if any, of Angie E. Chrisman, Deceased, Consolidated Gas Utilities Corporation, Howard M. Dukelow, Dan W. Forker and Guy Ankerholz, as The Board of County Commissioners of Reno County, Kansas, and Reno County, Kansas, Frank Banyard as Mayor and S. J. Bontrager, Robert A. Wilbeck, T. J. McAllister, Ralph Williams and Arthur B. Dirks as Councilmen of The City of South Hutchinson, Kansas and The City of South Hutchinson, Kansas, Albert T. Powell, as Trustee, Guy Dyson as Treasurer and Robert Beal as Clerk of Clay Township, Reno County, Kansas, and Clay Township, Fred Brower as Trustee, Joy C. Moore as Treasurer and Hubert Morgan as Clerk of Reno Township, Reno County, Kansas, and Reno Township, The Atchison, Topeka and Santa Fe Railroad Company, The Hutchinson and Southern Railroad Company, Chicago, Rock

Island and Pacific Railroad Company, Guy A. Thompson, Trustee of the Estate of the Missouri Pacific Railroad Company, and his Successor in office, if any, and the Missouri Pacific Railroad Company, The Kansas Power and Light Company, Valley Federal Savings and Loan Association of Hutchinson, The First Federal Savings and Loan Association of Hutchinson, The First National Bank of Hutchinson, Kansas, The Railroad Building Loan and Savings Association of Newton, Kansas, C. K. & N. Railway, United Power and Light Company, Hope Engineering and Supply Company, The Drillers Gas Company, Cities Service Gas Company, The Marine Midland Trust Company of New York and Baldwin Maull as Trustee.)

Case No.	*Date Filed*	*Title of Cause of Action*
8122	Aug. 30, 1954	In the Matter of Condemnation of Land for State Highway Purposes, Hy-Way 50-So—West 4th. 78-K, 5249 (1).

(This file shows, by affidavit of Drury R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication "Publication Notice" is attached, that said publication was published only ONE time, namely on the 3rd day of September, 1954.

Said "Publication Notice" is directed to E. B. Hall and Helen Hall; R. S. Sentney and Ida H. Sentney; R. Clyde Brown; Rollie Ellis; Tony P. Kleis and Ruth E. Kleis; Estate of James Maloney, Deceased, and All of His Unknown Heirs; Mary Maloney; T. J. Lingerfelt and Lucinda Lingerfelt; Chester Stover; Esther Lundsen and 32 other individuals, The Drillers Gas Company and The Federal Land Bank of Wichita, Wichita, Kansas.)

Case No:	*Date Filed*	*Title of Cause of Action*
8221	Oct. 22, 1954	In the Matter of the Application of The Kansas Power & Light Company, a Kansas Corporation, for the Appointment of Appraisers in the Condemnation of Property for the Purpose of Acquiring the Necessary Site and Location for the Construction, Maintenance and Operation of a Sub-station as a Part of and in Connection with its Electrical Distribution System.

(This file shows, by affidavit of Drury R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication "Notice of Condemnation" is attached, that said publication was published only ONE time, namely on the 24th day of October, 1954.

Said "Notice of Condemnation" is directed To Whom It May Concern and To Marjorie Alice Elsz and 11 other individuals and 2 corporations.)

4. That he has likewise examined the court files in the following causes of action, which were filed in the District Court of Harvey County, Kansas, of which Newton is the county seat, on the dates below set forth; that in each case so set forth the only service upon the defendants therein was pursuant to the General Statutes of Kansas (1949), Section 26-202, namely by a single publication in a newspaper which had been duly designated as the official publication for the said city of Newton, Kansas:

Case No.	*Date Filed*	*Title of Cause of Action*
12,965	Oct. 7, 1953	In the Matter of the Condemnation of Certain Private Property in Harvey County, Kansas, for the Purpose of Digging, Drilling or Constructing of Water Wells, Laying, Installing, Maintaining and Operating Pipes, Lines, Mains, Electrical Transmission-Control and Communication Circuits and Other Appurtenances Necessary for the Extending, Constructing, Enlarging and Improving of the Water Supply System and Water Works System of the City of Newton, Kansas.

(This file shows, by affidavit of Jack Lander, general manager of The Newton Kansan, to which affidavit a copy of said publication "Condemning Lands for Extension of Water Works Supply" is attached, that said publication was published only ONE time, namely on the 5th day of October, 1954.

The names of the owners of the tracts taken are not given either in the publication notice or in the Petition. The two tracts—each of eighty (80) acres—are outside the corporate limits of Newton, Kansas.)

Case No.	*Date Filed*	*Title of Cause of Action*
13,131	Feb. 11, 1955	In the Matter of Condemnation of Certain Private Property in Harvey County, Kansas, for the Purpose of Providing Right-of-Way for By-Pass and Right-of-Way for Certain Frontage Roads Necessary in Connection Therewith, Being State Highway Project No. 81-40 in 02-2(8), Harvey County.

(This file shows, by affidavit of Jack Lander, general manager of The Newton Kansan, to which affidavit a copy of said publication "Ordinance No. 1893" is attached, that said publication was published only One time, namely on the 4th day of February, 1955.

The names of the owners of the 9 tracts, some inside the corporate limits of the City of Newton, Kansas, and some outside, are not set forth in either the said publication notice or in the Petition filed therein.)

5. That the causes of action above mentioned are in nowise all of the causes of action which have been filed in either the District Court of Reno County, or Harvey County, Kansas; that the setting forth of a complete list of same would make the record unduly bulky; that to the belief and knowledge of this affiant, these cases were the usual form of notice practice in all cases; that the files show no service of summons on any of said landowners except that by a single publication as above set forth; and that this affiant has made a diligent search of the records, and has made diligent inquiry relative to the practice in this type of case, and firmly believes, and therefore sets it forth as fact, that in none of the above mentioned cases, nor in similar type cases, have the petitioners ever sought any other type of service of summons upon the landowners other than by a single publication notice; that this is true regardless of whether said landowners have been resident or non-resident owners.

Further Affiant Says Not.

s/ A. Lewis Oswald
A. Lewis Oswald
c/o Oswald, Mitchell & Thiessen
119 West Sherman Street
Hutchinson, Kansas

SUBSCRIBED AND SWORN TO before me this 31st day o
October, 1955.

s/ WANDA ALEXANDER
Notary Public

My commission expires Jan. 28, 1957.

(Seal)